



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 19, and 52

[FAC 2022-06; FAR Case 2016-002; Item I; Docket No. 2016-0002, Sequence No. 1]

RIN 9000-AN34

Federal Acquisition Regulation: Applicability of Small Business Regulations Outside the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to support the Small Business Administration (SBA) policy of including overseas contracts in agency small business contracting goals. This final rule allows small business contracting procedures, e.g., set-asides, to apply to overseas procurements.

DATES: *Effective:* [Insert date 30 days after date of publication in the *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703-605-2868, or by email at mahruba.uddowla@gsa.gov, for clarification of content. For

information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAC 2022-06, FAR Case 2016-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 84 FR 39793 on August 12, 2019, to support SBA's policy of including overseas contracts in agency small business contracting goals by allowing small business contracting procedures, e.g., set-asides, to apply to overseas procurements (i.e., procurements outside the United States and its outlying areas), which is expected to expand overseas opportunities for small business concerns. Twenty-six respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule makes conforming changes to FAR solicitation provisions 52.204-8, Annual Representations

and Certifications, and 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services. These changes are required to resolve conflicts between these provisions and the changes in the proposed rule to the prescriptions at FAR 19.309.

B. Analysis of Public Comments

1. Support for the rule

Comment: Multiple respondents expressed their support for the rule.

Response: The Councils acknowledge the respondents' support for the rule.

2. Opposition to the rule

Comment: A few respondents expressed their opposition to the rule.

Response: The Councils acknowledge the respondents' opposition to the rule. The Councils have taken into consideration all of the public comments in the development of this final rule.

3. Legal concerns regarding overseas application of the Small Business Act

Comment: One respondent stated that the Small Business Act must show an affirmative intent to apply overseas and reconcile conflicts of law, otherwise the statute is meant to apply only within the territorial jurisdiction of the United States. The respondent further stated the Small Business Act is silent regarding its

application overseas and does not account for conflicts of law. A second respondent stated that it has been the position of DoD that the Small Business Act does not apply outside of the United States and its outlying areas. According to the respondent, absent a statement of Congressional intent, the Government Accountability Office (GAO) has deferred to DoD's interpretation of the Small Business Act embodied in FAR 19.000(b) (Latvian Connection Gen. Trading & Constr. LLC, B-408633, 2013 CPD 224, September 8, 2013). The respondent described GAO's deference to DoD's interpretation embodied in the FAR as an example of "Chevron" deference, which does not give agencies license to follow statutes to the extent they deem desirable; instead, it is deference to an agency's permissible interpretation of an ambiguous statute. A third respondent noted that the Federal Acquisition Regulatory Council (FAR Council) stated that the change in the proposed rule is being done to be consistent with SBA's own rules. The respondent stated that by revising FAR 19.000(b) to explicitly make application of FAR part 19 "discretionary" for overseas contracts, the FAR Council is amending the FAR to continue to conflict with SBA's regulations directly, or at the very least conflict with SBA's stated interpretation of its regulations. This respondent mentioned that SBA's interpretation of the Small Business Act is that the application of the Act overseas is

mandatory, not discretionary. The respondent recommended that the FAR Council consult with SBA to ensure the FAR rule, and FAR 19.000(b) in particular, conform to SBA's regulations. Two respondents expressed concern regarding conflicts between this FAR rule and treaties and international agreements. One of the respondents stated the proposed rule did not require the contracting officer to document how they considered international agreements when exercising their discretion. The other respondent indicated that overseas contracting officers will not have the discretion to apply FAR part 19 when international treaties or international agreements require solicitation or award to host nation sources. According to this respondent, if the proposed rule is adopted, it should be revised to reflect this lack of discretion.

Response: In its October 2, 2013, final rule, SBA applied the Small Business Act to overseas acquisitions. The Councils note that, at the time of the GAO's decision in the cited Latvian Connection case, SBA's regulations were silent regarding the application of the Small Business Act outside the United States and its outlying areas. SBA's final rule amended 13 CFR 125.2, which SBA stated was issued in part to clarify its position that the Small Business Act applies "regardless of the place of performance".

The Councils proposed to amend the FAR to support SBA's changes to the basis for the Governmentwide small business contracting goals. This rule will allow for application of FAR part 19 overseas and thereby expand opportunities for small business concerns overseas. The Councils are aware that the SBA regulations at 13 CFR 125.2 do not make application of small business set-aside and sole-source authorities discretionary for overseas acquisitions. However, the Councils recognize that overseas acquisitions are subject to international agreements, treaties, local laws, diplomatic and other considerations that are unique to the overseas environment and may limit the Government's ability to apply the small business preferences in FAR part 19 on a mandatory basis. In addition, the Councils believe that policies issued subsequent to the promulgation of SBA's regulations, such as those in Executive Order (E.O.) 14005, Ensuring the Future Is Made in All of America by All of America's Workers, addressing steps to increase reliance on domestic manufacturing, will operate more effectively with a discretionary policy for use of set-asides overseas.

It is not practicable to list in the FAR everything that may affect the decision to set aside an overseas acquisition. Therefore, the Councils are amending the FAR to make the use of part 19 discretionary outside the United States and its outlying areas, so agencies and their

contracting officers can consider these factors in the exercise of their discretion. The Councils confirm that SBA representatives participated in the development of both the proposed and final FAR rules and concurred with both the proposed and final FAR rules.

4. Rule creates conflicts within the FAR

Comment: Two respondents stated that the proposed rule created conflicts within the FAR. The respondents cited the following examples of conflicts:

- The provisions at FAR 52.204-8, Annual Representations and Certifications, and 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services, explicitly provide that small business representations only apply when the resulting contract is to be performed in the United States or its outlying areas. This conflict makes the rule unclear for offerors and contracting officers.
- FAR 19.702(b)(3) and 19.708 do not explicitly require small business subcontracting plans for any contract performed entirely outside the United States or its outlying areas. The respondent believes that it is illogical for an agency to set aside an overseas contract for small business when it is prohibited from requiring small business subcontracting for those same contracts. The respondent points to Defense Federal

Acquisition Regulation Supplement (DFARS) clause 252.225-7002(b), Qualifying Country Sources as Subcontractors, as a further example that complements the FAR's prohibition on requiring a small business subcontracting plan for overseas contract.

- FAR part 25, Foreign Acquisition, is problematic to reconcile with the proposed rule. Specifically, the respondent points to the requirements at FAR 25.802 and DFARS 225.7401 for contracting officers to incorporate relevant requirements of international agreements into solicitations and contracts, while the proposed rule is silent on how contracting officers are to account for international agreements in making their discretionary set-aside decisions.

- It is difficult for a small business to comply with the requirements at FAR 52.219-14, Limitations on Subcontracting, and the "Balance of Payments" regulations at DFARS 225.75 (e.g., World Trade Organization Government Procurement Agreement) because each requirement specifies use of certain sources.

Response: With regard to the representation provisions, the Councils concur that there is a conflict. Conforming edits have been made to resolve the conflict at FAR 52.204-8(c)(1)(xii) and (xiii) as well as FAR 52.212-3(c).

With regard to FAR subpart 19.7, the Councils note that FAR 19.702(b) states that small business subcontracting plans are not required for contracts performed entirely overseas, but it does not prohibit use of set-asides for prime contracts overseas. Therefore, there is no conflict that needs to be resolved.

With regard to FAR 25.802, this final rule provides discretion to contracting officers in making a set-aside decision for overseas acquisitions so they can choose the appropriate acquisition strategy for the location. The discretion provided in the rule will allow contracting officers to avoid possible conflicts between FAR 52.219-14 and other regulations. For further discussion related to international agreements, see the responses to comments under category 9. For further discussion related to the limitations on subcontracting, see the response to comments under category 11.

5. Application of consolidation and bundling to overseas contracts

Comment: Two respondents recommend not revising the definition of "bundling" in FAR subpart 2.1, Definitions, to make bundling applicable to a contract that will be awarded and performed entirely outside of the United States. The respondents believe that if the requirements of FAR 7.107-2, Consolidation; 7.107-3, Bundling; and 7.107-4, Substantial bundling, are mandatory for overseas contracts,

then: (a) contracting officers would be required to justify not applying FAR part 19, and (b) this would cause overseas procurement actions involving bundling to be extremely burdensome, time consuming, and unlikely to occur.

Therefore, contracting officers should not be required to follow consolidation and bundling procedures for overseas contracts. One of the respondents stated that making bundling requirements applicable to overseas acquisitions is problematic for two reasons. First, such requirements can be inconsistent with acquisition approaches and source restrictions in international agreements, foreign military sales (FMS) letters of offer and acceptance, and other arrangements with foreign partners. Second, agencies regularly use the bundling strategy to make overseas requirements attractive to capable vendors to induce them to enter foreign markets.

Response: The Small Business Act does not exempt an agency from justifying its consolidation and bundling of contract requirements based on location of award, location of service performance, or location of supply delivery. The Councils note that the FAR currently applies the consolidation requirements to overseas contracts, which is consistent with the Small Business Act. As such, this rule is not making any changes to the FAR definition of "consolidation or consolidated requirement" at FAR 2.101, Definitions, nor the applicability of FAR 7.107-2,

Consolidation. The bundling requirements at FAR 7.107-3, Bundling, and 7.107-4, Substantial bundling, require an agency to make a written determination that such action is necessary and justified, allowing agencies to bundle in certain circumstances. Applying the bundling requirements to overseas contracts requires agencies to provide for maximum practicable participation by small business concerns as contractors. Providing for maximum practicable participation by small business concerns is not the same as mandating the use of set-asides or creating a de facto justification requirement for not applying FAR part 19 to overseas contracts. The respondent's comments on the DoD FMS Program are outside the scope of this case.

6. Negative impacts of the rule

a. Higher prices

Comment: Two respondents stated the changes in the proposed rule would negatively impact the taxpayer by driving up prices. One of the respondents believed that foreign-owned entities would almost always have better pricing for contracts performed overseas than U.S.-owned small businesses. The other respondent believed the changes would result in higher liabilities, ignorance of the market and environment, and less control over the work.

Response: The Councils recognize that overseas contracts are subject to considerations that are unique to the overseas environment, as described in the response to

comments under category 3. In acknowledgment of these considerations, this final rule retains the proposed rule text to make the use of FAR part 19 discretionary outside the United States and its outlying areas to allow contracting officers to use the most appropriate acquisition strategy. When the contracting officer is determining whether to set aside the procurement, fair market price, quality, and delivery are some of the factors considered. Any new entrants into overseas markets, whether small or other than small business concerns, will experience the same challenges: competing with native businesses who know the market, economic conditions, and applicable laws. However, each time U.S. small businesses go through the solicitation process for overseas contracts, they will gain experience and knowledge. By allowing discretionary use of small business procurement rules for overseas contracts, contracting officers can develop appropriate acquisition strategies to encourage U.S. small businesses to participate and become competitive. Small businesses will win contracts when their proposal or bid demonstrates they can perform the work at the lowest price or based on tradeoffs among price and non-price evaluation factors.

b. Additional acquisition lead time

Comment: One respondent stated that contracting officers must already consider complex sourcing

requirements for overseas acquisitions, and adding small business goals and set-asides to the process will add to acquisition lead time without adding corresponding value. The respondent noted that nothing currently precludes small businesses from competing for overseas acquisitions.

Response: The Councils recognize the complex sourcing requirements for overseas acquisitions. Discretionary use of FAR part 19 for overseas procurements will address an important public policy objective of the Government to enhance the participation of small businesses in overseas Federal acquisition as appropriate.

c. Improper influence of Government personnel

Comment: One respondent commented that allowing for discretionary authority to set aside overseas procurements may lead to prospective offerors trying to influence Government personnel in favor of set-asides or full and open competition in corrupt ways, since there are likely to be very few U.S. small businesses capable of fulfilling any complicated Government requirement in many foreign countries.

Response: The FAR addresses improper business practices and personal conflicts of interest in Government procurement at part 3, which applies regardless of the location or situation. Part 3 states that expenditure of public funds requires the highest degree of public trust and an impeccable standard of conduct. Therefore, Government

personnel are required to act in good faith when making acquisition decisions, which are subject to review as appropriate.

d. Contract issues and financial hardship

Comment: One respondent believed that it is impossible for a contracting officer to take into account all the possible unforeseen impediments and costs that a U.S. small business could encounter when performing in a foreign country. By making set-aside decisions, the contracting officer would end up awarding contracts with higher rates of default, delays, and claims than contracts awarded with unrestricted competition or including participation by host nation firms. Two respondents commented that U.S. small businesses are not suitable for overseas acquisitions and may end up suffering substantial losses by operating overseas. One of the respondents believed that small businesses, unlike large businesses, are unlikely to have the capability to make the necessary capital outlay, assign the necessary personnel, or offer local partners sufficient expectation of future work, to effectively prepare to perform in foreign countries, which may lead to project delays and increased costs for which the contractor could be liable. The other respondent used the cost of Value Added Taxes (VAT) on materials and services purchased in foreign countries, which the respondent calculates as averaging 20 percent, as an example to highlight the

unsuitability of a small business for overseas acquisitions. According to the respondent, while some contractors are exempt from paying VAT for work performed on behalf of the U.S. Government, the contractors must still pay the VAT at initial point of sale and then wait 6 months to a year for a refund of that VAT from the foreign government. According to the respondent, this creates financial hardship for small businesses.

Response: The Councils recognize overseas contracts are subject to considerations that are unique to the overseas environment, as described in the response to comments under category 3, for both small business concerns and other than small business concerns. In acknowledgment of these considerations, this final rule retains the proposed rule text to make the use of FAR part 19 discretionary outside the United States and its outlying areas to allow contracting officers to utilize the most appropriate acquisition strategy. The Councils note that prospective contractors are required to meet certain standards in order to be determined responsible and therefore, eligible for award. If there are questions regarding a prospective small business contractor's responsibility, the matter would be referred to SBA in accordance with FAR subpart 19.6. Offerors are expected to practice sound business judgment in deciding which overseas

opportunities to pursue and be aware of potential financial risks.

7. Overseas construction and services contracts

Comment: A few respondents noted that overseas construction contracts are high risk and complex. The respondents pointed to difficulties with supply chain management, meeting specified staffing requirements, understanding local market conditions, and managing local subcontractors and material suppliers as examples of the complexities of overseas construction contracts. One of the respondents stated that overseas construction and architect-engineer (A/E) contracts are inherently local in nature and require detailed knowledge of host nation laws and requirements related to construction, e.g., building standards, permitting and licensing requirements, environmental matters. As such, the respondents stated that overseas construction contracts are not suitable for small businesses. Two respondents stated FAR part 19 should exclude overseas construction and service contracts. One of the respondents proposed a revision at FAR 19.000(b) to exclude construction contracts.

Response: The Councils considered the recommended revision and decided not to adopt it in the final rule since it does not reflect the best course of action for every overseas construction acquisition. The Councils recognize overseas construction and service contracts are

subject to considerations that are unique to the overseas environment, as described in the response to comments under category 3, for both small business concerns and other than small business concerns. In acknowledgment of these considerations, this final rule retains the proposed rule text to make the use of FAR part 19 discretionary outside the United States and its outlying areas.

8. Clarification needed

a. Change not clear

Comment: One respondent stated the proposed rule is not clear regarding what is meant by "applying" FAR part 19 to overseas acquisitions. The respondent requested the rule state whether application referred to where the contracting officer is located or where contract performance will take place.

Response: The final rule does not change the way FAR part 19 applies in the United States and its outlying areas. The rule is written to provide maximum flexibility to contracting officers to apply FAR part 19 outside the United States and its outlying areas.

b. Revisions required to FAR 19.309

Comment: One respondent stated FAR 19.309 requires updating to indicate when provisions and clauses must be added.

Response: The final rule retains the proposed rule text to make changes to FAR 19.309, Solicitation provisions

and contract clauses, which allows the provisions and clauses to be added when the contracting officer exercises their discretion and applies FAR part 19 to an overseas procurement.

9. Treaties and other international agreements

Comment: One respondent concluded that the Competition in Contracting Act (CICA) explains how it applies when international agreements and treaties apply for contracts awarded outside of the United States. Two respondents pointed out that neither the Small Business Act nor the proposed rule do the same to reconcile U.S. obligations in applicable treaties and international agreements. One of these respondents stated that the proposed rule is contrary to international treaty obligations, other applicable international agreement obligations, or local laws. Consequently, the contracting officer may not have the discretion to apply FAR part 19 to most construction and services contracts to be performed in a foreign overseas location. Treaties and international agreements are treated as paramount and are recognized as authorized restrictions on competition outside the United States.

Response: The Councils agree that the Small Business Act does not specifically address U.S. contracting obligations under applicable treaties or international agreements. The Councils also agree that contracting

officers may not be able to apply FAR part 19 to overseas acquisitions when treaties or international agreements require solicitation or award to host nation sources or prohibit setting aside awards for U.S. firms. This FAR rule clarifies that FAR part 19 may be applied to procurements for supplies to be delivered or services to be performed outside the United States and its outlying areas. The proposed changes will encourage agencies to see if there are opportunities to contract with small businesses for overseas acquisitions and apply the Small Business Act to contracts awarded for performance overseas.

10. Foreign entities

a. Rule is supported by inaccurate data on foreign entities

Comment: One respondent stated that SBA cannot determine size standards for foreign entities, and that the entities are not eligible for socioeconomic categories. These entities are shown by default as "other than small" in the System for Award Management (SAM) and Federal Procurement Data System (FPDS), even though the entities may be small. The respondent noted that the proposed changes ignore that many contracts awarded outside the United States, for performance outside the United States, are awarded to foreign entities.

Response: SBA establishes size standards corresponding to North American Industry Classification System (NAICS)

codes, which apply to all offerors for a specific procurement, regardless of whether the offerors are foreign entities. SBA's regulations define "business concern" as an entity that is "organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor" (13 CFR 121.105). Such entities that meet the definition of "business concern" may be considered small for FAR part 19 procurements if they meet the size standard for the NAICS code assigned to a specific procurement. According to SBA, SAM and FPDS function as intended.

b. Rule excludes small foreign entities

Comment: A respondent commented that, since non-U.S. businesses are not considered "small," applying small business size standards outside the United States excludes foreign entities and limits competition to U.S. companies only, contrary to CICA.

Response: As explained in the response to the comment under category 10a, SBA's regulations allow "non-U.S. businesses" to be considered small business concerns for the purposes of FAR part 19 procurements if they meet the criteria at 13 CFR 121.105. The Councils note that CICA provides an exception that allows agencies to exclude from competition other than small businesses in furtherance of

sections 9 and 15 of the Small Business Act (see 10 U.S.C. 2304(b)(2) and 41 U.S.C. 3303(b)).

c. Rule allows foreign entities to benefit from set-asides

Comment: One respondent questioned why a small business that is "foreign located, foreign owned, foreign controlled" should be allowed to benefit from Federal procurement regulations.

Response: This FAR rule is not changing which business concerns qualify for part 19 procurements. See the response to the comment under category 10a for discussion of SBA's definition of "business concern."

11. Compliance with the limitations on subcontracting requirements

Comment: Two respondents raised concerns that many small businesses will likely have difficulties complying with the limitations on subcontracting requirements. One respondent pointed out that unlike large businesses, small businesses lack the necessary on-site personnel to perform certain percentages of work that are required by the FAR. The respondent further stated that in some countries labor laws mandate the use of local labor, which creates the concern of how to apply and administer the limitations on subcontracting requirements. The other respondent stated that in certain countries, non-local entities would need to be "sponsored," which means a U.S. small business cannot

operate without contracting out all on-site performance to a local subcontractor.

Response: The Councils recognize overseas contracts are subject to considerations that are unique to the overseas environment. It is not practicable to list in the FAR every factor that may affect an overseas acquisition. In acknowledgment of these considerations, this final rule retains the proposed rule text to make the use of FAR part 19 discretionary outside the United States and its outlying areas to allow contracting officers to utilize the most appropriate acquisition strategy. In addition, the Councils note that offerors should practice sound business judgment in deciding which opportunities to pursue. The Councils also note that FAR part 9 addresses certain standards every prospective contractor is required to meet to be determined responsible and therefore eligible for award.

12. Compliance with existing set-aside and subcontracting regulations

Comment: One respondent recommended that effort be made in forcing greater compliance with existing small business set-aside and subcontracting regulations instead of pursuing the changes in the proposed rule. The respondent believes the proposed rule is expanding the definition of small business to include "foreign located, foreign owned, foreign controlled" businesses overseas.

Response: Agencies have procedures and processes in place to monitor and ensure compliance with existing acquisition regulations. For example, with respect to compliance with the acquisition regulations in FAR part 19, the agencies' Office of Small and Disadvantaged Business Utilization, or for DoD, Office of Small Business Programs, along with the procurement center representatives at SBA, have oversight of the use of FAR part 19 in the procurement process. As a result of these roles and functions, the Government has met its statutory small business goals since fiscal year 2013. This rule is expected to expand opportunities for small businesses overseas.

For further discussion related to businesses that may qualify as small for FAR part 19 procurements, see the response to comments under category 10c.

13. Small businesses as subcontractors for overseas acquisitions

Comment: One respondent stated that U.S. small businesses in most cases are better off supplying their expertise under overseas acquisitions as subcontractors to prime contractors that are able to undertake the necessary preparations to perform the Government's overall requirements. The respondent believes that small businesses incur excessive overhead charges compared to large businesses, which will result in the Government being charged significantly more overhead costs.

Response: The Councils do not concur with the assumption that small businesses are not suitable as prime contractors for overseas acquisitions. This FAR case clarifies that FAR part 19 may be applied to overseas acquisitions. The changes will encourage agencies to seek opportunities to contract to small businesses for overseas acquisitions. The Councils note that market research and competition will help to establish fair and reasonable prices, inclusive of overhead, for overseas acquisitions, regardless of whether offerors are small businesses or large businesses.

14. Exemption from adjudication for complaints about noncompliance overseas

Comment: One respondent recommended that contracting officer decisions to set aside, or not to set aside, procurements outside of the United States and its outlying areas for small business be excluded from available grounds for protest. Similarly, the respondent recommended that advertisements of procurements alleged to represent bundling of requirements for performance outside of the United States and its outlying areas also be excluded from available grounds for protest. The respondent believes that because the proposed change has the effect of making compliance with the Small Business Act optional for procurements outside of the United States and its outlying

areas, those procurements should be exempt from protests related to noncompliance with the Small Business Act.

Response: The Councils do not have jurisdiction to exclude bundling actions or set-aside decisions as an available ground for protest. Agency level protests are governed by E.O. 12979, Agency Procurement Protests (October 25, 1995). GAO protests are governed by 4 CFR part 21. Protests in Federal courts are governed by 28 U.S.C. 1491. Therefore, the respondent's recommendation is not incorporated into the final rule.

15. Outside the scope of this rule

Comment: One respondent asked how this rule would impact the DoD requirement at DFARS 219.201 and if agencies outside of the United States would have to use the DD Form 2579, Small Business Coordination Record. A second respondent recommended that if the form 2579 was left as "fully open and competitive with no set aside," even if a small business wins the award, there should be zero credit for the small business winning the award because neither the agency nor the SBA had anything to do with its award to a small business. This respondent further asked why the agency or SBA should receive credit when not making solicitations set aside for small business. A third respondent noted that the proposed rule is contrary to the countless Defense agreements that restrict competition to local contractors. This respondent specifically referred to

the input a host nation would normally have regarding changes to an existing Status of Forces Agreement (SOFA). The respondent further stated that any changes without host nation input would not be well received by the host nation. One respondent noted that there are several DoD statutory exemptions for categories of contracts that should not be included by SBA for goaling purposes. The respondent also stated that these same contracting categories are exempt from SBA procurement center representative oversight. Therefore, the respondent does not believe the proposed rule is consistent with SBA's goaling guidelines. One respondent noted that SBA had a regulation stating that, unless a small business was owned and located in the United States, it was not a small business that could benefit from Federal procurement regulations.

Response: These comments are outside the scope of this rule. Although FAR 19.502-2 addresses small business set-asides, the use of the DD Form 2579 is addressed in DFARS 219.201. The procedures addressing credit for small business awards, small business procurement goals, and how they are implemented, are established in Section 15(g) of the Small Business Act and are not included in this FAR rule. DoD-specific requirements related to review by procurement center representatives are addressed in DFARS 219.402. Guidance specific to compliance with Defense agreements and SOFAs, as well as the statutory exemptions,

are implemented by DoD and are DoD-specific. Past definitions of "business concern" in SBA's regulations are not relevant to this rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-shelf (COTS) Items) or for Commercial Services

This rule amends the prescriptions at FAR 19.309, Solicitation provisions and contract clauses, for provision 52.219-1, Small Business Program Representations; provision 52.219-2, Equal Low Bids; and clause 52.219-28, Post-Award Small Business Program Rerepresentation. As a result of those amendments, this rule makes conforming changes to FAR provisions 52.204-8, Annual Representations and Certifications and 52.212-3, Offeror Representations and Certifications-Commercial Products and Commercial Services. However, this rule does not impose any new requirements on contracts at or below the SAT, for commercial products including COTS items, or for commercial services. The provisions and clause continue to apply to acquisitions at or below the SAT, and apply or not apply to commercial products including COTS items, and for commercial services.

IV. Expected Impact of the Rule

Currently, FAR 19.000(b) states that FAR part 19, except for FAR subpart 19.6, applies only in the United States or its outlying areas. Some contracting officers

have interpreted the phrase "applies only in the United States" to mean that they are not allowed to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements. Other contracting officers have interpreted "applies only in the United States" to mean that they are not required to use FAR part 19 procedures for overseas procurements but may do so if they choose. These conflicting interpretations have resulted in inconsistent use of FAR part 19 procedures for overseas procurements across Federal agencies. Conflicting interpretations may also contribute to low numbers of overseas contract actions that are set aside for small businesses.

This rule clarifies that contracting officers are allowed, but not required, to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements. While SBA's regulations do not make the use of small business regulations discretionary for overseas procurements, it is necessary for the FAR to make the use of the small business preferences in FAR part 19 discretionary to resolve the conflicts between, on the one hand, the Small Business Act and SBA's regulations and, on the other hand, international treaties and agreements, local laws, diplomatic and other factors that are unique to the overseas environment. Depending on the location of contract performance or delivery, these factors may limit

the Government's ability to apply the small business preferences in FAR part 19 on a mandatory basis. To resolve these conflicts, this final rule makes the use of FAR part 19 discretionary outside the United States and its outlying areas.

As a result of the clarification provided in this rule, contracting officers may set aside more overseas actions for small businesses in the future. However, this rule does not impose additional costs or reduce existing costs for small businesses who may compete. The rule merely allows additional opportunities to be provided to small businesses through set-asides and other tools in FAR part 19 for overseas procurements.

Data are not available on the number of overseas procurements contracting officers have not set aside for small business as a result of the conflicting interpretations described in the first paragraph of this section. According to data obtained from the Federal Procurement Data System (FPDS) for fiscal years 2019, 2020, and 2021 combined, there were 359,567 awards for performance overseas, including contracts, task orders and delivery orders, and calls under FAR part 13 blanket purchase agreements. Of those awards, 344,720 were made to approximately 12,002 unique large businesses, while 14,846 awards were made to approximately 3,223 unique small businesses. These numbers indicate that approximately 4

percent of actions awarded for performance outside the United States are awarded to small businesses.

Contract awards to small businesses could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas procurements. FAR 19.502-2(b) states that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from two small businesses and that award will be made at a fair market price. Similarly, sole-source authority under any of the small business programs also requires certain conditions to be met before being utilized. The conditions for using the FAR part 19 sole-source authorities include, but are not limited to, making award at a fair and reasonable price. It is not possible to identify how many small businesses will have the capability, capacity, or inclination to compete for contracts performed outside the United States. In addition, it is not possible to predict how many overseas procurements contracting officers will set aside for small businesses as a result of the FAR changes.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and therefore, was not subject to the review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to give agencies the tools they need, especially the ability to use set-asides, to maximize opportunities for small businesses outside the United States. Currently, the FAR states that the small business programs do not apply outside of the United States and its outlying areas (FAR 19.000(b)). However, with the changes to the Small Business Administration's (SBA's) guidelines for establishment of small business goals in

response to section 1631(c) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), contracts performed outside of the United States are now included in the Government's small business contracting goals. In addition, SBA has clarified that, as a general matter, its small business contracting regulations apply regardless of the place of performance.

This rule is seeking to increase opportunities for small business overseas and to support SBA's changes by expanding the use of set-asides and other tools to contracts performed outside of the United States.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

This rule may have a positive economic impact on small businesses. The rule expands existing procurement mechanisms (e.g., set-asides) to contracts performed outside the United States. Therefore, small businesses available to compete for Federal contracts performed outside the United States are most directly affected by this rule.

Analysis of the System for Award Management (SAM) as of January 2022 indicates there are over 420,000 small business registrants that can potentially benefit from the implementation of this rule. It is not possible to identify which of these small businesses will have the capability, capacity, and/or inclination to compete for contracts performed outside the United States. An analysis of the Federal Procurement Data System (FPDS) for fiscal years 2019, 2020, and 2021 revealed that for the combined three years, there were approximately 359,567 awards for performance overseas, including contracts, task orders and delivery orders, and calls under part 13 blanket purchase agreements (BPAs). Of those awards, 344,720 were made to approximately 12,002 unique large businesses, while 14,846 awards were made to approximately 3,223 unique small businesses.

This number could increase if contracting officers expand their use of set-asides and other tools in FAR part 19 for overseas contracts.

Therefore, this rule could affect a smaller number of small businesses than those found in SAM, but potentially more than those revealed by FPDS. DoD, GSA, and NASA note that the set-aside authority can only be used where a contracting officer has a reasonable expectation that offers will be received from at least two small businesses and that award will be made at a fair market price. Similarly, sole-source authority under any of the small business programs also requires certain conditions to be met before being utilized.

Nonetheless, this rule may have a significant positive economic impact on small business concerns competing for Federal contracting opportunities since it will provide additional Federal contracting opportunities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This final rule is not expected to have a negative impact on any small entity.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

List of Subjects in 48 CFR Parts 2, 19, and 52

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 19, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 19, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101, in paragraph (b)(2), in the definition of "Bundling", by removing paragraph (3).

PART 19—SMALL BUSINESS PROGRAMS

3. Amend section 19.000 by revising paragraph (b) to read as follows:

19.000 Scope of part.

* * * * *

(b)(1) Unless otherwise specified in this part (see subparts 19.6 and 19.7)—

(i) Contracting officers shall apply this part in the United States and its outlying areas; and

(ii) Contracting officers may apply this part outside the United States and its outlying areas.

(2) Offerors that participate in any procurement under this part are required to meet the definition of "small business concern" at 2.101 and the definition of "concern" at 19.001.

4. Amend section 19.309 by revising paragraphs (a) (1), (b), and (c) (1) to read as follows:

19.309 Solicitation provisions and contract clauses.

(a) (1) Insert the provision at 52.219-1, Small Business Program Representations, in solicitations exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied this part in accordance with 19.000 (b) (1) (ii).

* * * * *

(b) When contracting by sealed bidding, insert the provision at 52.219-2, Equal Low Bids, in solicitations when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied this part in accordance with 19.000 (b) (1) (ii).

(c) (1) Insert the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, in solicitations and contracts exceeding the micro-purchase threshold when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied this part in accordance with 19.000 (b) (1) (ii).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.204-8 by revising the date of the provision and paragraphs (c)(1)(xii) introductory text and (c)(1)(xiii) to read as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (**[Insert Abbreviated Month and Year 30 Days After Date of Publication in the *Federal Register*]**)

* * * * *

(c)(1) * * *

(xii) 52.219-1, Small Business Program Representations (Basic, Alternates I, and II). This provision applies to solicitations when the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

* * * * *

(xiii) 52.219-2, Equal Low Bids. This provision applies to solicitations when contracting by sealed bidding and the contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii).

* * * * *

6. Amend section 52.212-3 by revising the date of the provision and paragraph (c) introductory text to read as follows:

52.212-3 Offeror Representations and Certifications—

Commercial Products and Commercial Services.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL PRODUCTS AND

COMMERCIAL SERVICES (**[Insert Abbreviated Month and Year 30 Days**

After Date of Publication in the *Federal Register*])

* * * * *

(c) Offerors must complete the following representations when the resulting contract is for supplies to be delivered or services to be performed in the United States or its outlying areas, or when the contracting officer has applied part 19 in accordance with 19.000(b)(1)(ii). Check all that apply.

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[FR Doc. 2022-08577 Filed: 4/25/2022 8:45 am; Publication Date: 4/26/2022]